

VOLUNTARY COMPLIANCE AGREEMENT  
AIR QUALITY

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## EXHIBITS

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| Exhibit A | Form of Letter from APS, SRP, and Navajo Nation to Secretary of Interior Staying Dispute Resolution Proceedings.                                                                                                                                                       |
| Exhibit B | Complaints, Causes No. WR-CV-408-95, ( <i>Arizona Public Service Company et. al., v. the Navajo Nation</i> and WR-CV-409-95, ( <i>Salt River Project et. al., v. the Navajo Nation</i> ) , Navajo Nation District Court.                                               |
| Exhibit C | Agreement Staying Litigation in Navajo Nation District Court.                                                                                                                                                                                                          |
| Exhibit D | Petitions for Review of Administrative Rulemaking, Causes No. SC-CV-38-2000 ( <i>Arizona Public Service Company et. al., v. the Navajo Nation</i> ) and SC-CV-39-2000 ( <i>Salt River Project et. al., v. the Navajo Nation</i> ), Supreme Court of the Navajo Nation. |
| Exhibit E | Agreement Staying Litigation in Supreme Court of the Navajo Nation.                                                                                                                                                                                                    |
| Exhibit F | Stipulation To Dismiss Litigation Pending In Navajo Nation District Court as to Navajo Nation Clean Air Act, Without Prejudice.                                                                                                                                        |
| Exhibit G | Stipulation To Dismiss Litigation Pending In Supreme Court of the Navajo Nation, Without Prejudice.                                                                                                                                                                    |
| Exhibit H | Rules and Procedures Governing Arbitration Proceedings.                                                                                                                                                                                                                |

## **VOLUNTARY COMPLIANCE AGREEMENT AIR QUALITY**

This Voluntary Compliance Agreement ("Agreement") is entered into by the Salt River Project Agricultural Improvement and Power District ("SRP"), as operating agent for the Navajo Generating Station ("NGS") and with the express written consent of each Participant of NGS; Arizona Public Service Company ("APS"), as operating agent for the Four Corners Power Plant ("Four Corners") and with the express written consent of each Participant of Four Corners; and the Navajo Nation, a federally recognized Indian tribe (collectively, "the Parties").

### **ARTICLE 1 RECITALS**

- 1.1 Under section 301(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7601(d), and the Tribal Authority Rule, 40 C.F.R. Part 49, the Navajo Nation may apply for "treatment as a state" to implement Clean Air Act programs. Pursuant to these provisions, if the Navajo Nation meets certain eligibility requirements, it may submit tribal air quality programs to the USEPA for approval and, after USEPA approves the programs, the Navajo Nation will be authorized to implement and enforce the programs in place of USEPA.
- 1.2 The Navajo Nation intends to submit various air quality programs to USEPA for approval under the CAA, including a Title V operating permit program and an acid rain program, and to apply for Primacy under 40 C.F.R. Parts 49, 70, and 72 for those programs. The Navajo EPA intends to implement those USEPA-approved programs within its jurisdiction, pursuant to the provisions of the CAA and the Tribal Authority Rule.
- 1.3 The Navajo Nation intends to ask for delegation under 40 C.F.R. Parts 49 and 71 to administer a federal operating permits program within its jurisdiction until Navajo Nation EPA issues operating permits pursuant to a USEPA-approved program under 40 C.F.R. Part 70.
- 1.4 NGS and Four Corners (collectively, the "Plants") are coal-fired electric generating stations located within the exterior boundaries of the formal Navajo Indian Reservation. The participants in NGS are APS, the Department of Water and Power of the City of Los Angeles, Nevada Power Company, SRP, Tucson Electric Power Company, and the United States, and the participants in Four Corners are APS, SRP, Tucson Electric Power Company, Southern California Edison, Public Service Company of New Mexico, and El Paso Electric Company (collectively, the "Participants").
- 1.5 The Participants and the Navajo Nation disagree as to whether the Navajo Nation has the authority to regulate the Plants.
- 1.6 The Parties are entering into this Voluntary Compliance Agreement to provide a resolution, during the term of this Agreement, of the dispute between the Participants and the Navajo Nation as to the Navajo Nation's jurisdictional authority to regulate the Plants for the purposes covered by the express terms of this Agreement, as set forth below.
- 1.7 This Agreement is intended to establish a practical substitute for Navajo Nation regulation of air emissions from the Plants in a manner that does not require the jurisdictional dispute to be addressed. The Agreement will facilitate USEPA's approval of Navajo Nation Primacy for

two CAA programs and approval of delegated authority under the CAA prior to USEPA's approval of Primacy; will provide regulatory certainty for the Plants during the term of this Agreement; will provide continuity of air quality within the reservation; and will foster a positive relationship between the Parties.

## ARTICLE 2 DEFINITIONS

- 2.1 *Clean Air Act* or *CAA* means the Clean Air Act, 42 USC §§ 7401 *et seq.*
- 2.2 *Covenants* means the language of Section 16 of the NGS Lease and Section 22 of the Four Corners Lease.
- 2.3 *Delegation Agreement* means an agreement between USEPA and Navajo Nation EPA under which Navajo Nation EPA is authorized to administer a federal operating permits program under 40 C.F.R. Part 71 for NGS and Four Corners until Navajo Nation EPA issues operating permits pursuant to a USEPA-approved program under 40 C.F.R. Part 70.
- 2.4 *Enforceability Date* means the date upon which a prerequisite for enforcement of a permit under this Agreement has occurred, as specified in Section 4.1 (Effective Date; Enforceability Date).
- 2.5 *Grants* means the Section 323 Federal Grants of Rights-of-Way and Easements associated with the NGS and Four Corners Plants.
- 2.6 *Leases* means the Indenture of Lease for Navajo Units 1, 2, and 3, between the Navajo Tribe of Indians and the NGS Participants, dated September 29, 1969, and the Indenture of Lease for the Four Corners Power Plant between the Navajo Tribe of Indians and the Four Corners Participants, dated December 1, 1960, together with any amendments, supplements, and extensions thereof.
- 2.7 *Navajo Nation Acid Rain Rule* means the Navajo Nation Acid Deposition Control Regulations, as amended.
- 2.8 *Navajo Nation Clean Air Act* means the Navajo Nation Air Pollution Prevention and Control Act, 4 N.N.C. §§ 1101-62, as amended.
- 2.9 *Navajo Nation EPA* means the Navajo Nation Environmental Protection Agency.
- 2.10 *Navajo Nation Operating Permit Rule* means the Navajo Nation Air Quality Control Program Operating Permit Regulations, as amended.
- 2.11 *Navajo Nation Uniform Rules* means the Navajo Nation Environmental Protection Agency Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings, and Rulemakings under Navajo Nation Environmental Acts, as amended.
- 2.12 *Operating Agent* means SRP for the Navajo Generating Station and APS for the Four Corners

Power Plant.

- 2.13 *Participants* mean the participating owners in the Plants, as listed in § 1.4.
- 2.14 *Parties* means SRP, APS and the Navajo Nation.
- 2.15 *Plant* means either NGS or Four Corners.
- 2.16 *Primacy* means administration and enforcement of a program under the CAA by the Navajo Nation, pursuant to USEPA approval.
- 2.17 *Stringency Dispute* means a disagreement between or among the Parties as to whether a Navajo Nation permit, tribal implementation plan ("TIP"), rule or statute contains requirements proposed to be applied to the Plants that are more stringent than or in addition to corresponding federal requirements, whether the Navajo Nation EPA is enforcing or administering the permit requirements more stringently than USEPA would do as provided in Section 5.12, or whether USEPA or controlling federal court decisions would limit the stringency of a permit requirement or mitigate enforcement of that requirement.
- 2.18 *Title V* means Title V of the Clean Air Act Amendments of 1990, CAA §§ 501 to 507, 42 U.S.C. §§ 7661 to 7661f, and the regulations promulgated there under, 40 C.F.R. Parts 70 and 71.
- 2.19 *Tribal Authority Rule* means the regulations promulgated by the USEPA in 1998 at 63 Fed. Reg. 7254, 40 C.F.R. Parts 9, 35, 49, 50, and 81, as amended.
- 2.20 *USEPA* means the United States Environmental Protection Agency.
- 2.21 *VCA Permit* means a CAA Title V operating permit issued by the Navajo Nation under 40 C.F.R. Part 70 as provided in this Agreement after the USEPA has approved the Navajo Nation's application for Primacy under 40 C.F.R. Parts 49 and 70. The word "permit" when used in this Agreement includes VCA Permits, any Title V permits in existence for the plants on the Effective Date of this Agreement, and any federal operating permits issued to the Plants by the Navajo Nation EPA under a Delegation Agreement.

### ARTICLE 3 PRESERVATION OF JURISDICTIONAL POSITIONS

#### 3.1 Agreements Not To Assert.

3.1.1 As to the Plants. During the term of this Agreement, the Plants may not assert the Covenants or Grants as a bar to:

- (a) the Navajo Nation's application to USEPA for delegated authority and Primacy under Article 5 of this Agreement;
- (b) enforcement of the requirements contained in a permit administered by the Navajo Nation EPA under a Delegation Agreement; or
- (c) enforcement by the Navajo Nation of the requirements contained in a final accepted VCA Permit.

3.1.2 As to the Navajo Nation.

- (a) After expiration or termination of the Agreement, the Navajo Nation may not use the Participants' consent to this Agreement to assert jurisdiction over the Plants or to assert the legal doctrines of waiver, estoppel, laches, forfeiture, abandonment, acquiescence, or course of dealing as defenses to the assertion by the Participants of the Covenants or Grants as a bar to Navajo Nation regulation of, or application of Navajo Nation laws to, the Plants.
- (b) During the term of this Agreement, the Navajo Nation may not use the Participants' consent to the Agreement to assert jurisdiction over the Plants except with respect to air quality regulation as expressly provided herein.

3.2 Reservations of Rights After Expiration Or Termination Of Agreement.

3.2.1 As to the Plants. The Participants expressly reserve the right to challenge Navajo Nation jurisdiction over the Plants or Participants and to assert the Covenants or Grants as a bar to Navajo Nation regulation or to the application of Navajo Nation laws to the Plants after expiration or termination of the Agreement.

3.2.2 As to the Nation. The Navajo Nation expressly reserves the right to assert jurisdiction over the Plants or Participants and to challenge the scope, validity or effect of the Covenants or Grants as a bar to Navajo Nation regulation or application of Navajo Nation laws to the Plants after expiration or termination of the Agreement.

3.3 No Effect on Respective Jurisdictions. Nothing in this Agreement or in the implementation or administration of this Agreement may be deemed to affect the respective jurisdictions of the Navajo Nation or the USEPA.

3.4 Preservation of Jurisdictional Positions. By entering into this Agreement, none of the Parties concedes or waives any legal arguments concerning the authority or lack of authority of the Navajo Nation to regulate the Plants or Participants, except with respect to air quality as expressly provided in this Agreement and solely for the term of this Agreement. The Parties acknowledge and agree that this Agreement does not prejudice or limit in any way the rights or contentions of the Parties except with respect to air quality as expressly provided herein and solely for the term of this Agreement. The Parties further agree that this Agreement and any actions taken pursuant to this Agreement may not be used, or offered or entered into evidence, in any proceeding relating to the jurisdictional authority or lack of jurisdictional authority of the Navajo Nation over the Plants or Participants, including without limitation any proceeding concerning the scope, validity, or effect of the Covenants or Grants.

3.5 No Effect on Lease or Grant. Nothing in this Agreement modifies or amends the Leases or Grants. The acts or omissions of the Parties pursuant to this Agreement have no effect on the scope, validity, or effect of the Covenants or Grants, and do not constitute a waiver, abandonment, forfeiture, or relinquishment of the Participants' rights to invoke the Covenants or Grants upon expiration or termination of this Agreement.

**ARTICLE 4 TERM**

4.1 Effective Date; Enforceability Date. This Agreement is effective upon signature by all of the Parties (the "Effective Date"). The Navajo Nation shall not, however, regulate a Plant in any way unless and until the Enforceability Date for that Plant has occurred. A Plant's Enforceability Date occurs when either one of the following prerequisites to enforcement of a permit under this Agreement has been met:

- (a) USEPA has delegated authority under 40 C.F.R. Part 71 to the Navajo Nation to administer a federal operating permit program consistent with a Delegation Agreement and with this Agreement; or
- (b) the Plant's Operating Agent has accepted in writing a final VCA Permit offered by the Navajo Nation EPA for the Plant pursuant to Article 5 (Voluntary Compliance Program) of this Agreement.

4.2 Expiration. This Agreement is effective for a Plant and its Operating Agent only until, and expires upon the earliest of:

- (a) the expiration or termination of all Leases and Grants for that Plant;
- (b) rejection, consistent with this Agreement, by the Operating Agent of a VCA Permit offered by the Navajo Nation EPA for that Plant;
- (c) the termination of any VCA Permit issued by the Navajo Nation EPA for that Plant pursuant to this Agreement;
- (d) the expiration of any VCA Permit or Part 71 permit issued by the Navajo Nation EPA for that Plant pursuant to this Agreement, provided that the permit is not renewed;
- (e) the revocation of the Navajo Nation's delegated authority pursuant to 40 C.F.R. Part 71 before the Navajo Nation has obtained Primacy under 40 C.F.R. Parts 49, 70 and 72; or
- (f) the failure of the Navajo Nation to offer a permit to SRP or APS within twenty four months after the Operating Agent submits an operating permit application to the Nation.

4.3 Termination. This Agreement may be terminated:

- (a) under Section 5.3.3 (Termination Upon USEPA Action) by any Party if the USEPA does not act as set forth in Section 5.3.2 (USEPA Approval);
- (b) under Section 11.3 (Assertion of Authority Inconsistent With Voluntary Compliance Agreement) by the Operating Agent for a Plant if the Navajo Nation asserts or attempts to assert any jurisdiction or authority relating to air quality regulation over that Plant other than that derived from this Agreement;
- (c) under Section 11.2 (Challenge To Validity of Voluntary Compliance Agreement) by a Party if another Party challenges the validity of the Agreement;
- (d) under Article 10 (Breach) by a Party if another Party fails to abide by a settlement agreement reached in USEPA mediation or an award or other final disposition of an arbitrator;
- (e) under Article 10 (Breach) by a Party not in breach of this Agreement if another Party otherwise breaches the Agreement;
- (f) under Section 11.5 (No Specific Enforcement of Voluntary Compliance Agreement) by any Party if the Parties are unable to resolve a dispute through the dispute resolution methods set forth in Article 8;

- (g) by any Party if the USEPA denies approval of the Navajo Nation application for Primacy under 40 C.F.R. Parts 49 and 70;
- (h) under Section 4.4 (One-Time Opt-Out) by the Operating Agent for a Plant if the Operating Agent elects to opt out of this Agreement seven years after the Effective Date; or
- (i) under Section 5.11.2(b) (New or Amended Laws or Regulations), if the Navajo Nation promulgates a tribal implementation plan with requirements applicable to the Plants that are more stringent than corresponding federal requirements without first obtaining the Plants' express written consent to the requirements.

4.4 One-Time Opt-Out. Notwithstanding any other provision of this Agreement, an Operating Agent may terminate this Agreement with respect to its Plant for any reason seven calendar years after the Effective Date, even if the termination occurs in the middle of a permit term.

#### 4.5 Effect Of Expiration Or Termination.

##### 4.5.1 Expiration or Termination For One Plant or Both Plants.

- (a) Rejection or Expiration of VCA Permit. In the event that the Operating Agent for one Plant accepts a VCA Permit but the Operating Agent for the other Plant rejects a VCA Permit or fails to renew a VCA Permit, this Agreement remains in full force and effect with regard to the Operating Agent that accepts a VCA Permit and expires only with respect to the Operating Agent that rejects or fails to renew a VCA Permit.
- (b) Expiration of Leases and Grants. In the event that all of the Leases and Grants for one Plant expire or are terminated, this Agreement expires only with regard to the Operating Agent for that Plant but remains in full force and effect with regard to the Operating Agent for the other Plant so long as the other conditions of this Agreement are met.
- (c) Termination of VCA. This Agreement may be terminated under Subsections 4.3 (c), (d), (e), (f), (g), (h) or (i) with respect to one Plant but not the other. Any termination of the Agreement under Subsections 4.3 (a) or (b) is effective as to all Parties.

4.5.2 Right of Plant to Terminate When Other Plant in Breach. The Party with the right to terminate this Agreement under Subsections 4.3 (c), (d) or (e) is further specified in Section 11.2 (Challenge to Validity of Voluntary Compliance Agreement) and Article 10 (Breach).

4.5.3 Effectiveness. All terminations are effective immediately upon receipt of written notice from the Party terminating the Agreement to the other Parties.

## ARTICLE 5 VOLUNTARY COMPLIANCE PROGRAM

### 5.1 Navajo Nation Environmental Laws.

5.1.1 Navajo Nation Air Quality Laws. The Navajo Nation laws concerning air quality



regulation that are in effect as of the Effective Date of this Agreement are the Navajo Nation Clean Air Act, the Navajo Nation Acid Rain Rule, the Navajo Nation Operating Permit Rule, and the Navajo Nation Uniform Rules (to the extent that the Uniform Rules prescribe administrative procedures relating to the preceding three laws).

5.1.2 Applicability. Except as otherwise provided in this Agreement, nothing in this Agreement will or may subject NGS or Four Corners to any provisions of the Navajo Nation statutes or rules that have not been incorporated into a Part 71 permit administered by the Navajo Nation EPA pursuant to a Delegation Agreement or a final accepted VCA Permit.

5.2 Notice To Secretary. Within ten working days after the Effective Date of this Agreement, the Parties shall send a joint letter to the Secretary of the United States Department of the Interior, in the form set forth in Exhibit A, requesting that the Secretary continue to stay the dispute resolution process set forth in the Leases and Grants for NGS and Four Corners during the term of this Agreement. The Navajo Nation agrees that this Agreement may not in any way be deemed a waiver or amendment of any provisions of the Leases or Grants or a waiver of the Participants' rights or obligations to request dispute resolution under the Leases.

5.3 Navajo Nation Applications to USEPA.

5.3.1 Delegation and Primacy Applications. The Navajo Nation intends to apply for program approval and Primacy under the CAA for an acid rain program and a Title V operating permit program, based on the Navajo Nation Clean Air Act, the Navajo Nation Acid Rain Rule, the Navajo Nation Operating Permit Rule, and the Navajo Nation Uniform Rules. The Navajo Nation also intends to apply for delegation under 40 C.F.R. Part 71 to administer a federal operating permit program until Navajo Nation EPA issues operating permits pursuant to a USEPA-approved program under 40 C.F.R. Part 70. In making these applications, the Navajo Nation shall submit a jurisdictional statement, and an Attorney General's Opinion consistent with the jurisdictional statement, to USEPA. The Navajo Nation shall expressly state in the jurisdictional statement that:

- (a) the Nation's jurisdiction over NGS and Four Corners is in dispute;
- (b) the Parties have entered into a Voluntary Compliance Agreement to resolve this dispute as it relates to the Nation's administration of permits under the Title V and Acid Rain programs for the term of the Agreement;
- (c) the Operating Agents have agreed to comply with the provisions of the Navajo Nation's laws that are expressly incorporated into Section 5.4 of this Agreement (Permits Administered Under Delegated Authority) and into a Part 71 permit administered by the Navajo Nation EPA pursuant to a Delegation Agreement or into a final accepted VCA Permit;
- (d) the Operating Agents have agreed for the term of the Agreement not to assert the Covenants or Grants as a bar to the Navajo Nation's regulation of the Plants under a Part 71 permit administered by the Navajo Nation EPA pursuant to a Delegation Agreement or under the provisions of the Navajo Nation's laws that are incorporated into Section 5.4 of this Agreement (Permits Administered

Under Delegated Authority) and into a Part 71 permit administered by the Navajo Nation EPA pursuant to a Delegation Agreement or into a final accepted VCA Permit, without prejudice to the Participants' right to assert the Covenants or Grants as a bar to

- (i) any other regulation of the Plants by the Nation during the term of this Agreement; or
- (ii) any regulation, including air quality regulation, after expiration or termination of the Agreement, which rights are expressly reserved;
- (e) the Navajo Nation has agreed not to use the Participants' consent to this Agreement as the basis for assertion of jurisdiction over the Plants or Participants or assertion of the legal doctrines of waiver, estoppel, laches, abandonment, forfeiture, acquiescence, or course of dealing as defenses to the assertion by the Participants of the Covenants or Grants after expiration or termination of this Agreement, without prejudice to the Nation's right to otherwise assert jurisdiction over the Plants or Participants and to challenge the scope, validity, or effect of the Covenants or Grants after expiration or termination of this Agreement, which right is expressly reserved;
- (f) the Agreement provides the Nation with authority to enforce the Operating Agents' compliance with the terms of a permit administered under and during the term of a Delegation Agreement;
- (g) the Agreement provides the Nation with authority to enforce the terms of a final accepted VCA Permit;
- (h) the provisions of the Navajo Nation laws that will be incorporated into the VCA Permits satisfy the relevant requirements of the CAA and implementing regulations;
- (i) USEPA should not make a determination with respect to the scope, validity, or effect of the Covenants or Grants;
- (j) USEPA should approve the Navajo Nation's application for delegation under 40 C.F.R. Part 71 to administer a federal operating permit program with respect to the Plants, but only for the term of the Agreement;
- (k) USEPA should approve the Navajo Nation's Primacy application with respect to the Plants, but only for the term of the Agreement; and
- (l) if this Agreement is terminated or expires for a plant, then the permit then in effect for that plant remains in full force and effect as provided for in 40 C.F.R. § 71.4 (k), but the Plants shall be regulated by USEPA.

5.3.2 USEPA Approval. The Parties contemplate that in approving the Navajo Nation's delegation of authority and Primacy applications, USEPA will state expressly that:

- (a) the Navajo Nation and the Participants of the Four Corners Power Plant and the Navajo Generating Station disagree as to the Nation's jurisdiction to regulate the Plants;
- (b) the Navajo Nation, SRP, and APS have entered into a Voluntary Compliance Agreement, which provides that they will not assert or challenge any effect of Covenants and Grants on the authority of the Navajo Nation EPA to administer a delegated Part 71 program with respect to the Plants or on the applicability to the Plants of the requirements of the Navajo Nation laws that have been expressly incorporated into Section 5.4 of this Agreement and into a Part 71 permit

administered by the Navajo Nation EPA pursuant to a Delegation Agreement (Permits Administered Under Delegated Authority) or a final accepted VCA Permit, without prejudice to their rights to assert or challenge the Covenants or Grants after expiration or termination of the Agreement;

- (c) during the term of the Agreement the Nation has adequate authority to regulate the Plants pursuant to the authority delegated to the Nation by Congress in the Clean Air Act to regulate non-Indian activities within Indian reservations;
- (d) the Agreement provides for the Operating Agents to comply with final, accepted VCA Permits issued pursuant to and during the term of the Agreement;
- (e) USEPA recognizes that the Agreement contains provisions in Section 5.12 (Administration of Permits), 5.5.2 (Applications For Renewal), and Article 8 (Dispute Resolution) that are not contained in the Navajo Nation laws, and provisions in Article 6 (Permit Content), and Sections 5.11.2 (New or Amended Laws or Regulations), 9.3 (Administrative Penalties), 9.4 (Shutdown Orders), and 9.6 (Citizen Suits) that vary from the Navajo Clean Air Act. USEPA understands that provisions of the Navajo Nation laws that are inconsistent with these provisions of the Agreement will not be incorporated into a VCA Permit. USEPA agrees that if these provisions in the VCA are used in place of Navajo Nation laws with respect to the Plants, that in and of itself will not render a VCA Permit less stringent than required under the Clean Air Act and implementing regulations;
- (f) USEPA therefore proposes to approve the Navajo Nation's delegation of authority application and Title V and Acid Rain Primacy applications with respect to the Plants, but only for the term of, and consistent with, the Agreement; and
- (g) if the Agreement is terminated or expires for a plant, then the permit then in effect for that plant remains in full force and effect as provided for in 40 C.F.R. § 71.4 (k), but the Plants shall be regulated by USEPA.

5.3.3 Termination Upon USEPA Action. This Agreement may be terminated by any Party, notwithstanding any other provision of this Agreement, if:

- (a) in approving the Nation's delegation of authority under 40 C.F.R. Parts 49 and 71 or in approving the Nation's Primacy application under 40 C.F.R. Part 49, 70, or 72, USEPA does not make the statements set forth in Section 5.3.2 (USEPA Approval);
- (b) USEPA states that it has based the approval of delegated authority or Primacy on inherent authority of the Navajo Nation; or
- (c) USEPA makes a determination at any time regarding the scope, validity, or effect of a Covenant or Grant.

5.3.4 Future Primacy Applications.

- (a) Additional CAA Programs. This Agreement does not prevent the Navajo Nation from applying for treatment as a state and Primacy for CAA programs in addition to the acid rain program and the Title V operating permit program in the future, but the Navajo Nation shall not seek or accept any such treatment with regard to the Plants without the prior written agreement of

SRP and APS, provided that SRP and APS shall agree to the applications if the programs in question do not contain any requirements applicable to the Plants that are more stringent than the corresponding federal requirements.

- (b) Stringency. If there is a dispute among the Parties that cannot be resolved by consultation pursuant to Section 8.1 (Consultation By the Parties) as to whether the programs contain any requirements applicable to the Plants that are more stringent than the corresponding federal requirements, the Parties shall comply with the mediation and arbitration provisions in Sections 8.2 (USEPA Mediation) and 8.3 (Arbitration) to attempt to resolve the dispute.
- (c) Application. If this Agreement is in effect at the time that the Navajo Nation submits future treatment as a state and Primacy applications:
  - (i) the Navajo Nation shall include in any jurisdictional statements or legal opinions submitted for the applications by the Navajo Nation the language specified in Section 5.3.1 (Delegation and Primacy Applications), and
  - (ii) the provisions of Section 5.3.2 (USEPA Approval) and 5.3.3 (Termination Upon USEPA Action) apply.

#### 5.4 Permits Administered Under Delegated Authority.

5.4.1 Existing USEPA Permit. Neither Operating Agent is required to make an annual fee payment to the Navajo Nation EPA within the same calendar year as the Operating Agent has made or is required to make an annual fee payment to USEPA. After receiving delegated authority under 40 C.F.R. Part 71 to administer a federal operating permits program, the Navajo Nation shall not modify the Title V and acid rain permits in existence for the Plants on the Effective Date of this Agreement except as follows:

- (a) to reflect the change in permitting authority;
- (b) to incorporate the procedures for permit applications and permit processing set forth in Sections 404 and 405 (C), (D), and (E) of the Navajo Nation Operating Permit Rule;
- (c) to modify the process of annual fee submittal;
- (d) to incorporate the provisions of Subpart VI of the Navajo Nation Operating Permit Rule;
- (e) to identify new recipients for submittal of reports and notices;
- (f) to incorporate provisions requiring the Plants to provide information and access to the Navajo Nation EPA;
- (g) to clarify that permits are enforceable by the Navajo Nation EPA as well as by the USEPA, as provided in Section 5.4.5 (Permit Enforcement); or
- (h) to make any other change required by federal law.

#### 5.4.2 Part 71 Permit Renewals.

- (a) Mandatory Initial Part 71 Renewal Permit. If a Title V permit in effect for a Plant on the Effective Date is expected to expire before the Navajo Nation has obtained Primacy under 40 C.F.R. Parts 49 and 70, the Operating Agent for the Plant shall submit a permit application to the Navajo Nation EPA in the

same manner provided for in Subpart IV of the Navajo Nation Operating Permit Rule, pursuant to the requirements of 40 C.F.R. Part 71 and the Delegation Agreement, and the Navajo Nation shall issue a Part 71 renewal permit. For the purposes of this paragraph, a "Title V permit in effect for a Plant on the Effective Date" shall include a Title V permit revised by the Navajo Nation pursuant to Section 5.4.1 (Existing USEPA Permit).

- (b) Discretionary Subsequent Part 71 Permit Renewal. If a subsequent renewal Part 71 permit issued by the Navajo Nation to a Plant is expected to expire before the Navajo Nation has obtained Primacy under 40 C.F.R. Parts 49 and 70, the Operating Agent for the Plant may, in its sole discretion, elect to submit to the Navajo Nation EPA an application for renewal. This Agreement expires at the end of the then-current permit term for any Plant for which an application for renewal is not submitted to the Navajo Nation EPA. For the purposes of this paragraph, a "subsequent renewal Part 71 permit" means any Part 71 permit issued by the Navajo Nation to a Plant after the first renewal Part 71 permit referenced in paragraph 5.4.2(a).

5.4.3 Part 71 Permit Content. The Navajo Nation shall include applicable federal requirements, and not requirements of Navajo Nation laws, in any permit issued under Part 71. Notwithstanding the foregoing sentence, the Navajo Nation will incorporate into the Part 71 permit the following provisions identified in Section 5.4.1 (Existing USEPA Permit):

- (a) procedures for permit applications and permit processing set forth in Sections 404 and 405 (C), (D), and (E) of the Navajo Nation Operating Permit Rule;
- (b) provisions of Subpart VI of the Navajo Nation Operating Permit Rule regarding the collection of annual permit fees;
- (c) provisions requiring the Plants to provide information and access to the Navajo Nation EPA; and
- (d) provisions authorizing the enforcement activities specified in Section 5.4.5 (Permit Enforcement).

5.4.4 Permit Administration. The provisions of Section 5.12 (Administration of Permits) apply to the Parties with respect to any Part 71 permit issued or administered by the Navajo Nation EPA. In addition, during the period after the Navajo Nation receives delegation of a Part 71 program for the Plants but before the Navajo Nation EPA revises and reissues the existing USEPA permits in accordance with Section 5.4.1 (Existing USEPA Permit), the permittees shall comply with the following procedures, which are incorporated into this Agreement for the purpose of governing the Plants during this period, despite the fact that these procedures are not yet incorporated into the Part 71 permits:

- (a) procedures for permit applications and permit processing set forth in Sections 404 and 405 (C), (D), and (E) of the Navajo Nation Operating Permit Rule;
- (b) provisions of Subpart VI of the Navajo Nation Operating Permit Rule regarding the collection of annual permit fees;
- (c) provisions requiring the Plants to provide information and access to the Navajo Nation EPA; and

- (d) provisions authorizing the enforcement activities specified in Section 5.4.5 (Permit Enforcement).

5.4.5 Part 71 Permit Enforcement. The Navajo Nation will not seek to enforce any permit issued under Part 71 in tribal court, but will refer all such enforcement to USEPA. However, upon becoming aware of possible civil violations or criminal activity regarding compliance with the Part 71 program, the Navajo Nation will notify and provide evidentiary documentation to USEPA. Pursuant to the Delegation Agreement, the Navajo Nation has the authority to:

- (a) develop compliance plans and schedules of compliance;
- (b) conduct compliance and monitoring activities, including review of monitoring reports and compliance certifications, inspections, audits, conducting and/or reviewing stack tests, and issuing requests for information either before or after a violation is identified; and
- (c) conduct enforcement-related activities, including issuance of notices, findings, and letters of violation, and development of cases up to, but not including, the filing of a complaint or order.

## 5.5 VCA Permit Applications.

5.5.1 Initial VCA Permit Application. Each Operating Agent shall submit a permit application to the Navajo Nation EPA pursuant to the requirements of the Navajo Nation Operating Permit Rule, the Navajo Nation Acid Deposition Control Rule (if applicable), the Navajo Nation Uniform Rules and this Agreement within one year after USEPA has approved the Navajo Nation's Primacy application for a Title V operating permit program in accordance with Section 5.3 (Navajo Nation Applications to USEPA). Along with the application, SRP and APS shall submit to the Navajo Nation EPA copies of any applications or draft air quality permits pending before USEPA and a copy of any air quality permit in effect. Any permit in effect for a Plant at that time remains in effect until the Operating Agent for the Plant accepts in writing a VCA Permit offered by the Navajo Nation EPA in accordance with Section 5.8 (Acceptance of VCA Permit).

5.5.2 Applications For Renewal. An Operating Agent may, in its sole discretion, elect to submit to the Navajo Nation EPA an application for a new VCA Permit. If the Operating Agent chooses to apply to the Navajo Nation EPA, the application must be submitted at least six (6) but no more than eighteen (18) months before the expiration of the then-current permit term. This Agreement expires at the end of the then-current permit term for any Plant for which an application for a new permit is not submitted to the Navajo Nation EPA.

5.6 Draft VCA Permit. The Navajo Nation EPA will determine the completeness of any application for a VCA Permit and develop a draft VCA Permit for each Plant pursuant to the requirements of the Navajo Nation Operating Permit Rule. If the Navajo Nation EPA determines that an application is incomplete and requests additional information, pursuant to § 401(A) of the Navajo Nation Operating Permit Rule, the applicant shall provide the

information if it would be required by the Navajo Nation Operating Permit Rule. Each draft VCA Permit will contain requirements based on the Navajo Nation laws listed in Section 5.1 (Navajo Nation Environmental Laws) and applicable federal requirements, including requirements in any final federal implementation plan ("FIP") that is issued for the Plants before the effective date of this Agreement. The Navajo Nation EPA also shall incorporate into the draft VCA Permit the procedures for permit applications and permit processing set forth in Sections 404 and 405 (C), (D), and (E) of the Navajo Nation Operating Permit Rule, the provisions of Subpart VI of the Navajo Nation Operating Permit Rule regarding the collection of annual permit fees, and provisions requiring the Plants to provide information and access to the Navajo Nation EPA. In addition, if the Navajo Nation CAA laws or regulations have been amended, revised, enacted, or promulgated during the prior permit term, the new VCA Permit may include requirements based on those laws as provided in Section 5.8 (Acceptance of VCA Permit). The draft VCA Permit must contain provisions of a final FIP, but the Navajo Nation EPA shall abide by any federal court decision issued on appeal of a contested FIP and will amend the incorporated provisions accordingly. If a FIP is finalized by USEPA after the effective date of this Agreement, its requirements may be included only as provided in Section 5.11.2 (New or Amended Laws or Regulations).

- 5.7 Offer of VCA Permit. The Navajo Nation EPA shall provide for review of a draft VCA Permit by the relevant Operating Agent thirty days prior to the Navajo Nation EPA's submittal of the draft permit to the Administrator of USEPA, affected programs, and the public for review. The Operating Agent may also submit comments on the draft VCA Permit for its Plant within the time allowed by the rules for public comment. After the public comment period, and after any objections from the USEPA Administrator have been addressed, the Navajo Nation EPA shall formally offer the VCA Permit to the Operating Agent. The offered VCA permit will be considered a final permit decision under Section 403(G) of the Navajo Nation Operating Permit Rule, which requires the Navajo Nation EPA to issue a response to comments pursuant to Section 213 of the Navajo Nation Uniform Rules.

5.8 Acceptance of VCA Permit.

- 5.8.1 Mandatory. The Operating Agent shall accept a VCA Permit in writing within thirty (30) days after its receipt if the Operating Agent determines in good faith that the VCA Permit offered by the Navajo Nation EPA:

- (a) is consistent with this Agreement and the applicable provisions of the Navajo Nation Clean Air Act, the Navajo Nation Acid Deposition Control Rule, and the Navajo Nation Operating Permit Rule that are not in conflict with this Agreement; and
- (b) in the case of renewal permits, is also consistent with the applicable provisions of any other Navajo Nation air quality laws for which the Navajo Nation has received primacy that are not in conflict with this Agreement; and
- (c) does not contain any requirements that are more stringent than or are in addition to the corresponding federal requirements.

- 5.8.2 Discretionary. SRP and APS may each in their sole discretion accept a VCA Permit offered by the Navajo Nation EPA even though it contains requirements that are more stringent than or in addition to the corresponding federal requirements. A VCA

Permit containing more stringent or additional requirements may be accepted by one Operating Agent and rejected by the other.

- 5.9 Objection to VCA Permit. If the Operating Agent objects to any provision of the offered VCA Permit, the Parties must negotiate in good faith to agree on revisions to the VCA Permit that address the objections. If the Parties cannot resolve the objections within sixty (60) days, the Parties shall comply with the mediation and arbitration provisions in Sections 8.2 (USEPA Mediation) and 8.3 (Arbitration) to resolve the dispute. If the dispute resolution determines that the VCA Permit contains more stringent requirements and the Parties cannot agree on revisions that would address the concern, the Operating Agent may reject the VCA Permit.
- 5.10 Effect of Acceptance of VCA Permit. An Operating Agent shall operate its Plant in compliance with the requirements of a final accepted VCA Permit for the permit term unless this Agreement is terminated. The Navajo Nation shall not regulate the permittee except as provided in the final accepted VCA Permit and this Agreement. A final accepted VCA Permit is considered a final agency action under Section 403(I) of the Navajo Nation Operating Permit Rule for permit appeal purposes as provided therein.
- 5.11 Permit Modification.
- 5.11.1 Modification Upon Request. An Operating Agent may request a permit modification during a permit term. If the Navajo Nation modifies the permit, the modification must be consistent with this Agreement and may not contain any requirements that are more stringent than or in addition to the corresponding federal requirements unless the Operating Agent agrees to incorporation of the requirements into the permit.
- 5.11.2 New or Amended Laws or Regulations.
- (a) Notwithstanding Section 406 of the Navajo Nation Operating Permit Rule, if applicable Navajo Nation laws or regulations are amended during the permit term, or if new laws or regulations are enacted or issued, the amendments or new laws, regulations, or requirements may not be incorporated into a VCA Permit (unless the amendments were promulgated to implement minimum federal standards of the approved Part 70 program or were otherwise approved by USEPA, such as a TIP), and the permittee shall continue to comply with the original permit requirements for the term of the permit. If applicable federal laws or regulations are amended during the term of the permit, or if new federal laws or regulations are enacted or issued, they must be incorporated into the VCA Permit if federal law requires incorporation.
- (b) The Navajo Nation shall not promulgate a tribal implementation plan ("TIP") that contains requirements applicable to the Plants that are more stringent than corresponding federal requirements, unless the Navajo Nation first provides SRP and APS with a copy of the proposed TIP and SRP and APS provide the Navajo Nation with their express prior written consent to the provisions of the TIP that are applicable to the Plants and are more stringent than corresponding federal requirements. If the Navajo Nation promulgates a TIP containing such requirements without prior written consent, APS or SRP may terminate this



Agreement.

5.12 Administration of Permits.

5.12.1 Stringency. It is the intent of the Parties that, in administering any permit for the Plants during the term of this Agreement, the Navajo Nation shall interpret any ambiguous requirements, and administer and enforce the permit, in a manner that is no more stringent than USEPA would do. Accordingly, the Navajo Nation agrees that in its administration and enforcement of the permit, it will be no more stringent than:

- (a) any USEPA precedent that limits the stringency of a requirement or mitigates enforcement, including USEPA policies (including enforcement policies), USEPA guidance documents, USEPA applicability determinations, USEPA interpretive letters, Federal Register notices, official USEPA correspondence and other such documents, and any decisions of the USEPA administrative law judiciary, and
- (b) any controlling federal court decisions.

5.12.2 Conflicts. Where a conflict exists between any of the documents referenced in this section, the Parties shall consult to arrive at a mutually agreed-upon determination. The Parties will place more importance on controlling federal court decisions than on conflicting USEPA legal and policy decisions. The Parties will abide by an applicable federal court decision where the court has addressed a matter on which USEPA has expressed no prior legal or policy decision.

5.13 Termination of USEPA Permit. Upon written acceptance by an Operating Agent for a Plant of a final VCA Permit, any previously issued Title V or acid rain permit for that Plant terminates, the permittee shall discontinue any annual fee payments to USEPA pursuant to 40 C.F.R. Part 71, and the permittee shall instead pay fees to the Navajo Nation EPA in the same amount and in the same manner as is required by the Navajo Nation Operating Permit Rule.

5.14 Rejection of VCA Permit. Upon written rejection under this Agreement by an Operating Agent of any VCA Permit offered by the Navajo Nation EPA, this Agreement expires with respect to the rejecting Operating Agent and its Plant.

5.15 Permit Continuance. In order to ensure the continuation of operations at the Plants pursuant to Title V in the event that this Agreement expires or terminates for any reason:

- 5.15.1 The Party terminating the VCA with respect to any Plant shall immediately notify USEPA of the termination, and shall provide advance notice if possible.
- 5.15.2 Any Plant for which the VCA has expired or been terminated shall continue to operate pursuant to the Navajo Nation EPA permit last in effect, until or unless USEPA revises or reissues the permit or USEPA replaces a Part 70 permit with a Part 71 permit.

- 5.15.3 The Parties agree that if this Agreement expires or is terminated for any reason, the proper Title V operating permit for either Plant is a 40 C.F.R. Part 71 permit, subject to the provisions of Section 3.2 (Reservation of Rights After Expiration or Termination of Agreement) and 40 C.F.R. § 71.4(k).
- 5.15.4 While the regulations at 40 C.F.R. § 70.10 provide various procedural protections to the regulatory authority operating an approved 40 C.F.R. Part 70 permit program, those protections may not be used to delay or prevent the timely filing by the Operating Agent, and receipt by USEPA of a Part 71 permit application or action by USEPA to approve the application.

## **ARTICLE 6 VCA PERMIT CONTENT**

All VCA permits must contain the following language instead of the language contained in the Navajo Nation CAA at 4 N.N.C. § 1135(c):

"This permit is issued pursuant to the Voluntary Compliance Agreement between the permittee and the Navajo Nation. Permittee shall comply with the terms of this permit and shall be subject to enforcement of the permit by the Navajo Nation EPA, pursuant to the terms of the Voluntary Compliance Agreement. Permittee's agreement to comply is effective upon the permittee's written acceptance of the permit and expires at the end of the permit term, unless the permit is renewed. Permittee's agreement to comply may be withdrawn during the permit term only if the Voluntary Compliance Agreement is terminated or expires pursuant to Sections 4.2 or 4.3 of the Agreement."

## **ARTICLE 7 STAY OR DISMISSAL OF PENDING LITIGATION**

No later than five working days after an Operating Agent receives notice from the Navajo Nation that its Plant's Enforceability Date has occurred, the Operating Agent shall file with the Navajo Nation District Court a stipulation in the form of Exhibit F, and shall file with the Navajo Nation Supreme Court a stipulation in the form of Exhibit G, dismissing the litigation initiated by the Operating Agent, as follows: if the Enforceability Date has occurred for NGS, SRP shall dismiss Cause No. SC-CV-38-2000 (*Salt River Project et. al., v. the Navajo Nation*) in the Supreme Court of the Navajo Nation and shall dismiss the air quality related claims in Cause No. WR-CV-409-95 (*Salt River Project et. al., v. the Navajo Nation*) in the Navajo Nation District Court; and if the Enforceability Date has occurred for Four Corners, APS shall dismiss Cause No. SC-CV-39-2000 (*Arizona Public Service Company et. al., v. the Navajo Nation*) in the Supreme Court of the Navajo Nation, and shall dismiss the air quality related claims in Cause No. WR-CV-408-95 (*Arizona Public Service Company et. al., v. the Navajo Nation*) in the Navajo Nation District Court.

## **ARTICLE 8 DISPUTE RESOLUTION**

In recognition of the fact that litigation of disputes under this Agreement could raise many issues of sovereign immunity, qualified immunity, and statutory privilege and immunity resulting from the fact that the Navajo Nation is a sovereign Indian Nation, the fact that SRP is a political subdivision of the State of Arizona, and the fact that the United States is a Participant at NGS, the Parties have agreed to a system of alternative dispute resolution in lieu of litigation. Disputes arising out of Navajo Nation EPA permit enforcement actions under Article 9 of this Agreement are resolved as

specified in that Article. Every other dispute between the Parties arising from this Agreement or the breach of this Agreement must be resolved as follows:

- 8.1 Consultation by the Parties. The Parties shall use their best efforts to settle any dispute arising out of this Agreement promptly through negotiation between representatives of the Parties with authority to resolve the dispute. One Party's written notice to the others of the dispute will trigger a formal meet and confer process requiring written responses from the other Parties within thirty days after receipt of the initial notice. Both the initial notice and the response must include a statement of position and a summary of the arguments supporting that position. Authorized representatives of the Parties shall meet at a mutually agreeable time and place or communicate by telephone conference call as often as is necessary to attempt in good faith to resolve the dispute. All reasonable requests for information made by one Party to the other must be honored. The Parties shall treat all negotiations under this paragraph as confidential compromise and settlement negotiations under the Federal Rules of Evidence. If the matter has not been resolved within sixty days after receipt by all of the Parties of the initial written notice under this Section, any Party may initiate dispute resolution under Section 8.2 (USEPA Mediation), 8.3 (Arbitration), or 8.4 (Emergency Relief), as applicable.
- 8.2 USEPA Mediation. If a Stringency Dispute arises and cannot be settled through negotiation under Section 8.1 (Consultation by the Parties), the Parties must try in good faith to settle the dispute by mediation administered by the Conflict Prevention and Resolution Center of USEPA Region IX. The mediation must be conducted in accordance with the Conflict Prevention and Resolution Center rules in effect at the time of the dispute and with the following agreement of the Parties:
- 8.2.1 Initiation. Any Party may initiate mediation by filing with the USEPA a written request for mediation. A request for mediation must contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating Party shall simultaneously file one copy of the request with the USEPA and one copy with every other Party.
- 8.2.2 Appointment of Mediator. USEPA rules provide that upon receipt of a request for mediation, the USEPA will appoint a qualified mediator to serve. A single mediator will be appointed unless the Parties unanimously agree otherwise or the USEPA determines otherwise. Each Party is obligated under this Agreement to disclose any financial, personal, or professional ties to any selected mediator. USEPA rules call for the USEPA to then either replace the mediator or immediately communicate the information to the other Parties for their comments. If the Parties disagree as to whether the mediator may serve, the USEPA will appoint another mediator.
- 8.2.3 Representation. Any Party may be represented by persons of the Party's choice. Each Party shall communicate the names and addresses of those representatives in writing to all Parties and to the USEPA.
- 8.2.4 Scheduling. The mediator shall fix the date and the time of each mediation session. The mediator shall select the place of each mediation session by choosing from

among the following locations: (a) the Region IX USEPA offices in San Francisco, California, for disputes relating to either Plant or both Plants; (b) the Navajo Nation EPA offices in Window Rock, Arizona, for disputes relating to either Plant or both Plants; (c) the SRP offices in Phoenix, Arizona, for disputes relating to NGS or to both Plants; (d) the APS offices in Phoenix, Arizona, for disputes relating to Four Corners or both Plants; or (e) another location in Phoenix, Arizona that is agreeable to the mediator and the Parties.

- 8.2.5 Initial Memoranda. At least ten days prior to the first scheduled mediation session, each Party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. The mediator may direct the Parties to exchange these memoranda. At the first session, the Parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any Party to supplement such information.
- 8.2.6 Conduct of Mediation. The mediator does not have the authority to impose a settlement on the Parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the Parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the Parties agree and assume the expenses of obtaining the advice. Arrangements for obtaining the advice may be made by the mediator or the Parties, as the mediator determines.
- 8.2.7 Confidentiality. Mediation sessions are private. The Parties and their representatives are entitled to attend mediation sessions. Other persons may attend only with the permission of the Parties and with the consent of the mediator. All records, reports, or other documents received by a mediator while serving in that capacity are confidential. There will be no stenographic record of the mediation process. The Parties may not later seek to compel the mediator to divulge records of the mediation or to testify in regard to the mediation in any adversary proceeding or judicial forum. The Parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:
- (a) views expressed or suggestions made by another Party with respect to a possible settlement of the dispute;
  - (b) admissions made by another Party in the course of the mediation proceedings;
  - (c) proposals made or views expressed by the mediator;
  - (d) the fact that another Party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
  - (e) confidential information gained as a result of disclosure to a mediator by the Parties or by witnesses in the course of the mediation.
- 8.2.8 Termination. USEPA rules provide for the mediator to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the Parties. If the mediation is terminated and the

dispute has not been resolved, the Parties shall proceed to arbitration under Section 8.3 (Arbitration) or 8.4 (Emergency Relief). The mediation may be terminated:

- (a) by the execution of a settlement agreement by the Parties;
- (b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
- (c) by a written declaration of a Party or Parties to the effect that the mediation proceedings are terminated.

8.2.9 No Liability. Neither the USEPA nor any mediator is a necessary party in any later proceedings between the Parties. Neither the USEPA nor any mediator is liable to any Party for any act or omission in connection with any mediation conducted under this Agreement.

8.2.10 Expenses. The expenses of witnesses for either side must be paid by the Party producing the witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator and representatives of the USEPA, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the mediator, must be borne equally by the Parties unless they agree otherwise. Any financial obligations of the Navajo Nation are contingent upon available appropriations, pursuant to 2 N.N.C. Section 223(A).

8.3 Arbitration. If the Parties are unable to resolve any dispute or claim arising out of or relating to this Agreement or the breach of this Agreement through consultation under Section 8.1 (Consultation by the Parties), or any Stringency Disputes through mediation under Section 8.2 (USEPA Mediation), then the Parties shall attempt to settle the matter by arbitration in accordance with the rules and procedures set forth in Appendix H. The arbitration is non-binding, except as provided in Section 9.8 (Stringency Disputes Arising During An Enforcement Action).

8.4 Emergency Relief. Any Party may seek expedited resolution of a dispute or claim by application to the arbitrator or arbitration panel and hereby agrees to voluntarily maintain the status quo until the arbitrator or arbitration panel has had an opportunity to consider and rule upon a request for emergency relief.

8.5 Effect of Arbitrator's Award. The arbitrator shall not have the authority to alter, amend or otherwise modify this Agreement. The award or other final disposition may not be enforced, entered, or filed in any court or tribunal except as provided in Section 9.8 (Stringency Disputes Arising During An Enforcement Action), except that a party may enter or file the award or other final disposition in any court or tribunal in defense of a lawsuit. The award or other final disposition may not be recorded in any state, local, or tribal office. An award or other final disposition may be made public only with the consent of all Parties or as required by law.

## ARTICLE 9 PERMIT ENFORCEMENT

9.1 Navajo Nation Enforcement of VCA Permits. Navajo Nation enforcement of VCA Permits under this Agreement is limited to enforcement of VCA Permit requirements under this

Article in tribal court and in federal court where permitted. All enforcement must be pursuant to this Agreement and the VCA Permit and not pursuant to any Navajo Nation law independent of this Agreement or the VCA Permit. The Navajo Nation EPA may bring enforcement actions only for violations that occur after the Enforceability Date, and shall not bring any enforcement action alleging violations that occurred before the Enforceability Date. If continuing violations commence before the Enforceability Date and continue after the Enforceability Date, the Navajo Nation EPA may bring enforcement actions, and seek penalties, only for those violations that actually occur after the Enforceability Date. Any attempt by the Navajo Nation to enforce a permit beyond its fair meaning is beyond the powers of the Navajo Nation over SRP or APS as limited by federal law and is reviewable in the federal courts.

- 9.2 Civil Penalties. Upon approval of the primacy application, the Navajo Nation may recover civil judicial penalties in amounts not to exceed \$27,500 per day per violation of the permit (or such larger amount as may be provided for in the CAA in the future), consistent with Section 502(C) of the Navajo Nation Operating Permit Rule. Any recovery is subject to appropriate mitigating factors, including but not limited to mitigating factors included in any relevant USEPA civil penalty policy in effect at the time of the violation.
- 9.3 Administrative Penalties. Notwithstanding the provisions of the Navajo Nation Clean Air Act at 4 N.N.C. Section 1155, the Navajo Nation EPA shall not seek administrative penalties against the Plants.
- 9.4 Shutdown Orders. Notwithstanding the provisions of the Navajo Nation Clean Air Act at 4 N.N.C. Section 1105, the Navajo Nation EPA may not issue an administrative order or seek a judicial order for an Operating Agent to shut down operation of its Plant or any portion thereof in order to address an imminent and substantial endangerment to public health and the environment. The Navajo Nation EPA will, however, provide information to and otherwise assist USEPA with any action USEPA brings pursuant to CAA § 303 to address an imminent and substantial endangerment.
- 9.5 Criminal Referrals. Pursuant to federal law, the Navajo Nation does not have criminal enforcement authority over the Plants. As part of the Primacy application that the Navajo Nation EPA plans to submit to the USEPA for an acid rain program and Title V operating permit program, the Navajo Nation will enter into a memorandum of agreement with USEPA Region IX, under which the Navajo Nation EPA will refer all criminal enforcement actions against non-Indians (and certain criminal enforcement actions against Indians), including information concerning potential criminal enforcement actions, to the USEPA or other appropriate federal agencies, as required by 40 C.F.R. § 49.8 (2003).
- 9.6 Citizen Suits. Citizen suits may be commenced or maintained in federal court as authorized under Section 304 of the Clean Air Act to enforce any permit issued pursuant to this Agreement. Nothing in this Agreement constitutes consent by either Operating Agent to tribal court jurisdiction over a suit commenced or maintained by a person or entity not a Party to this Agreement, to any suit brought before the Enforceability Date, or to any suit brought after expiration or termination of this Agreement. The Navajo Nation EPA shall not incorporate into any permit offered to an Operating Agent under this Agreement either Section 306 of the Navajo Nation Clean Air Act, 4 N.N.C. § 1156, or any other provision

allowing suits in tribal court by third parties against the Operating Agents.

- 9.7 Defenses. In furtherance of Section 5.12 (Administration of Permits), it is a defense to any enforcement action brought pursuant to this Agreement that application of USEPA policies (including enforcement policies), guidance documents, applicability determinations, interpretive letters, Federal Register notices, official correspondence and other such documents, as well as any decisions of the USEPA administrative law judiciary or any controlling federal court decisions, to a permit requirement pursuant to the priorities listed in Section 5.12 renders the Plant in compliance with the requirement. Notwithstanding the foregoing, an Operating Agent may raise any other defenses available under this Agreement or applicable law.
- 9.8 Stringency Disputes Arising During An Enforcement Action. In the event that a Stringency Dispute arises during an enforcement action brought by the Navajo Nation, the Parties to the enforcement action shall stipulate to a stay of the enforcement action to allow resolution of the Stringency Dispute under Section 8.2 (USEPA Mediation), 8.3 (Arbitration), or 8.4 (Emergency Relief), and shall also stipulate that an award or other final disposition by an arbitrator or a settlement agreement reached in USEPA mediation is binding upon the Parties. An award or other final disposition under Section 8.3 or 8.4 shall become binding as a judgment of the Navajo Nation court and shall be entered in the judgment docket.

#### **ARTICLE 10 BREACH OF VCA**

- 10.1 Breach. Failure of any Party to perform any material covenant or obligation set forth in this Agreement, if that failure is not remedied within ten business days after receipt of written notice from another Party or within ten business days after the conclusion of dispute resolution proceedings in which it has been determined that the Party failed to perform, is a breach of this Agreement. If a Party fails to abide by a settlement agreement reached in USEPA mediation or by an award or other final disposition of an arbitrator under Section 8.2 (USEPA Mediation), 8.3 (Arbitration), or 8.4 (Emergency Relief), the other Party to the dispute may terminate this Agreement.
- 10.2 Dispute Resolution. A Party who has received written notice of an alleged failure to perform may challenge the allegation by initiating dispute resolution under Article 8 (Dispute Resolution) within ten business days after receipt of the notice, and that initiation tolls the ten-day period for remedying failure to perform. Any Party found by an arbitrator to have failed to perform a material covenant or obligation set forth in this Agreement has a period of ten business days after conclusion of the dispute resolution proceedings to remedy the failure to perform.
- 10.3 Remedies. If a breaching Party has failed to comply with this Agreement after expiration of the ten-day period for remedying failure to perform under Section 10.1 (Breach), any other Party has the right upon written notice to the other Parties to terminate this Agreement, or to initiate arbitration under Section 8.3 (Arbitration) or 8.4 (Emergency Relief), in that Party's sole discretion. Likewise, if a breaching Party has failed to comply with this Agreement after expiration of the ten-day period for remedying failure to perform under Section 10.2 (Dispute Resolution), any other Party has the right upon written notice to the other Parties to terminate this Agreement, in that Party's sole discretion. For purposes of this Section and Section 4.3



(c), (d), or (e) (Termination) if APS or SRP is the breaching Party, then only the Navajo Nation has the right to terminate this Agreement or initiate arbitration under this Section.

- 10.4 Several Obligations. One Party's breach of this Agreement is never deemed to be a breach of the Agreement by any other Party.

## ARTICLE 11 EFFECT OF AGREEMENT

- 11.1 Use. This Agreement has been arrived at through good faith negotiation for the purpose of resolving legal disputes, including pending litigation. All Parties agree that conduct, statements, offers, compromises or prior drafts of this Agreement made in the course of the negotiations are not admissions against interest, and may not be used in any legal proceeding.
- 11.2 Challenge to Validity of Voluntary Compliance Agreement. None of the Parties may commence a judicial or administrative action challenging the validity of this Agreement or the authority of any Party to enter into it. If the Navajo Nation or any of its representatives, agents, officers, employees, agencies, or departments, acting in their official capacity, seek to change any law in a manner that would change the obligations of the Parties under this Agreement or otherwise invalidate the Nation's execution of this Agreement, or to bring a judicial or administrative action challenging the validity of the Agreement, SRP or APS may terminate the Agreement as to the Plant for which it is the Operating Agent. If SRP or APS brings a judicial or administrative action challenging the validity of the Agreement, the Navajo Nation may terminate the Agreement as to the relevant Plant. If any person or entity not a Party to this Agreement commences any judicial or administrative action challenging the Agreement's validity, the Parties shall jointly request that the court, tribunal, agency, or official before which the action is pending dismiss the action. If the action is not dismissed, any Party may file an appropriate responsive pleading, or otherwise act as reasonably necessary to respond to the action or to otherwise protect the Party.
- 11.3 Assertion of Authority Inconsistent with Voluntary Compliance Agreement. The Navajo Nation expressly contemplates and agrees that for the term of this Agreement and the permits administered pursuant to this Agreement, the Navajo Nation shall not assert or attempt to assert any jurisdiction or authority relating to air quality regulation at the Plants except the authority derived from this Agreement. If the Navajo Nation asserts or attempts to assert any air quality jurisdiction or authority over the Plants except in accordance with this Agreement, the Operating Agents may terminate this Agreement.
- 11.4 Challenge to Acts Outside the Scope of Voluntary Compliance Agreement. Subject to Section 11.6 (No Waiver of Sovereign Immunity), nothing in this Agreement prohibits the Parties or the Participants from commencing an action or proceeding to challenge any act of the Parties or the Participants that is outside the scope of this Agreement. When permitted by federal law, an action may be brought in federal court.
- 11.5 No Specific Enforcement of Voluntary Compliance Agreement. No Party to this Agreement may commence an action or proceeding in any court to enforce the terms of this Agreement. Disputes under this Agreement may be resolved under Article 8 (Dispute Resolution) through consultation, mediation, or arbitration. The exclusive remedy for disputes not resolved through these dispute resolution methods is termination of the Agreement under Section 4.3



(Termination), except as provided in Section 9.8 (Stringency Disputes Arising During an Enforcement Action).

- 11.6 No Waiver of Sovereign Immunity. Nothing contained in this Agreement may be interpreted as constituting a waiver, express or implied, of the sovereign immunity of the Navajo Nation or of the United States.

## ARTICLE 12 REPRESENTATIONS

Each Party represents and warrants as of the date of this Agreement as follows:

- (a) It has full legal right, power and authority to execute, deliver and perform this Agreement;
- (b) It has taken all appropriate and necessary action to authorize the execution, delivery and performance of this Agreement;
- (c) It has obtained all consents, approvals and authorizations necessary for the valid execution and delivery of this Agreement;
- (d) This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency or similar laws or by limitation upon the availability of equitable remedies;
- (e) It is not in violation of any applicable law promulgated or judgment entered by any federal, state, local or other governmental body, which violations, individually or in the aggregate, would adversely affect the performance of its obligations under this Agreement; and
- (f) The execution, delivery and performance by it of this Agreement, the compliance with the terms and provisions hereof and the carrying out of the transactions contemplated hereby, (a) do not conflict with and will not conflict with or result in a breach or violation of any of the terms and provisions of its organizational documents, and (b) to the best of its knowledge, do not conflict with and will not conflict with or result in a breach or violation of any of the terms and provisions of any law, rule or regulation, or any order, writ, injunction, judgment or decree by any court or other governmental body against it or by which it or any of its properties is bound, or any loan agreement, indenture, mortgage, note, resolution, bond or contract or other agreement or instrument to which it is a party or by which it or any of its properties is bound, or constitute or will constitute a default there under or will result in the imposition of any lien upon any of its properties.

## ARTICLE 13 ADMINISTRATIVE PROVISIONS

- 13.1 Governing Law. This Agreement and the permits and the rights and obligations of the Parties under this Agreement and the permits must be governed by and interpreted in accordance with the following substantive law and rules of decision, without regard to choice of law rules, and in the following order of priority:

- (a) Federal law where federal law would otherwise apply;

- (b) Navajo Nation statutes, ordinances, and regulations in effect on the Effective Date of this Agreement concerning which agencies and officers of the Navajo Nation have authority, and what authority they have, to act on behalf of the Navajo Nation, and the procedures required for the exercise of their authority; and
- (c) Federal law and rules of decision relating to the interpretation, validity, and enforcement of consensual agreements, whether or not federal law or rules of decision would apply of their own force absent agreement of the Parties that such federal law and rules of decision apply.

- 13.2 Amendments. Neither this Agreement nor any provisions of this Agreement may be changed, waived, discharged, or terminated orally and may only be modified or amended by an instrument in writing, signed by all the Parties, except that the Agreement may expire or be terminated with respect to one Operating Agent and not the other, as provided in Article 4 of this Agreement.
- 13.3 Binding Effect. This Agreement is binding on and inures to the benefit of the Parties and their respective successors and assigns.
- 13.4 Notices. Unless otherwise specifically provided elsewhere in this Agreement, any notice required or permitted by this Agreement must be in writing and may be personally served, telecopied, telexed, or sent by courier or United States certified mail. Notice is deemed to have been given when delivered in person or by courier service, upon receipt of a telecopy or telex, or five days after deposit in the United States mail with prepaid postage and proper address, as follows:

If to SRP, to:

Manager  
Environmental, Land, Papago Park Center, and Risk Management  
Salt River Project  
P.O. Box 52025  
Mail Station PAB351  
Phoenix, AZ 85072-2025

With copies to:

Legal Services  
Salt River Project  
P.O. Box 52025  
Mail Station PAB207  
Phoenix, AZ 85072

And:

Manager  
Power Generation  
P.O. Box 52025

Mail Station POB002  
Phoenix, AZ 85072

And:

Plant Manager  
Navajo Generating Station  
P.O. Box 850  
Mail Station NGS010  
Page, AZ 86040

If to APS, to:

Plant Manager  
Four Corners Power Plant  
Arizona Public Service Company  
P.O. Box 355  
Fruitland, NM 87416

With copies to:

Corporate Secretary  
Arizona Public Service Company  
Pinnacle West Capital Corporation  
Mail Station: 9068  
P.O. Box 53999  
Phoenix, AZ 85072

And:

Law Department  
Pinnacle West Capital Corporation  
Law Department  
Mail Station: 8695  
P.O. Box 53999  
Phoenix, AZ 85072

If to the Navajo Nation EPA, to:

Executive Director  
Navajo Nation EPA  
P.O. Box 339  
Window Rock, Arizona 86515

With copies to:

Air Program Manager  
Navajo Nation EPA  
P.O. Box 529

Fort Defiance, AZ 86504

And:

Attorney General  
Navajo Nation Department of Justice  
P.O. Drawer 2010  
Window Rock, AZ 86515

- 13.5 Assignment. SRP or APS or any Participant at NGS or Four Corners may transfer or assign, without the consent of the Navajo Nation or the Navajo Nation EPA, its interests and obligations under this Agreement to any parent, subsidiary, affiliate or successor in interest of the Participant by merger, acquisition, or consolidation, or to any other current or future Participant, provided that the assignee assumes in writing all of the assignor's obligations under this Agreement.
- 13.6 Entire Agreement. The Recitals set forth in Article 1 hereof, and the Exhibits attached hereto, are specifically incorporated in and constitute part of this Agreement. This Agreement constitutes the entire agreement among the Parties with respect to voluntary air quality compliance and supersedes all prior or contemporaneous oral agreements, prior drafts of this Agreement, understandings, representations and warranties, courses of conduct and courses of dealing between the Parties with respect to that subject. This Agreement does not supersede any prior written agreements or documents.
- 13.7 Limited Responsibility. The Parties acknowledge and agree that it is their mutual intent that the obligations, representations, warranties and undertakings under this Agreement or as a result of the transactions contemplated by this Agreement are limited to only those expressly set forth herein, and not enlarged by implication, creation of law, or otherwise.
- 13.8 Waiver. The failure of any one of the Parties at any time to require strict performance by the others of any of the undertakings, agreements, or covenants of this Agreement does not waive, affect, or diminish any right of any of the Parties to demand strict compliance and performance. None of the undertakings, agreements, or covenants of the Parties under this Agreement are deemed to have been waived unless the waiver is by an instrument in writing that contains the specific waiver and is signed by the Party to be charged.
- 13.9 Method of Execution. This Agreement may be executed in multiple counterparts, each of which is deemed an original, but all of which constitute one and the same instrument.
- 13.10 Survival. Termination or expiration of this Agreement does not relieve any Party of any obligation under this Agreement that by implication survives the Agreement, including without limitation the provisions of Article 3 (Preservation of Jurisdictional Positions) and Section 5.15 (Permit Continuance).
- 13.11 Several Obligations. The covenants, obligations and liabilities of the Parties are intended to be several and not joint or collective, and nothing herein may be construed to create an association, joint venture, trust, or partnership, or to impose a trust or partnership covenant, obligation or liability on or with regard to any of the Parties.

- 13.12 Severability. If any term or condition of this Agreement is held to be invalid, void, or unenforceable by any court or tribunal of competent jurisdiction, that holding does not affect the validity or enforceability of any other term or condition of this Agreement, unless the court or other tribunal determines that enforcing the balance of the Agreement would deprive a Party of a fundamental benefit of its bargain.
- 13.13 Standards of Interpretation. This Agreement and any permit issued pursuant to this Agreement must be interpreted according to the fair meaning of the text of each and may not be interpreted in favor of or against any Party. The standard of interpretation stated in the foregoing sentence overrides any principle of deference to the interpretation or administration adopted by government agencies or officers, any principle of interpretation in favor of Indians or Indian tribes, and any other contrary principle of interpretation.

Date: 5/18/05

By: Edwina C. Schneider  
Salt River Project Agricultural Improvement  
and Power District

Date: 5-18-05

By: John R. Summer  
Arizona Public Service Company

Date: May 18, 2005

By: Joe Sweeney  
President, The Navajo Nation

Date: May 18, 2005

By: Robert J. Tully  
Director, Navajo Nation EPA